

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Application for Review of a Decision by)
the Wireline Competition Bureau)
)
Information Technology Department) File No. SLD-245592
State of North Dakota)
Bismarck, North Dakota)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)
)
Changes to the Board of Directors of the) CC Docket No. 97-21
National Exchange Carrier Association, Inc.)

ORDER**Adopted: October 8, 2003****Released: October 21, 2003**

By the Commission: Commissioners Copps and Adelstein dissenting and issuing a joint statement.

1. Before the Commission is an Application for Review filed by the Information Technology Department of the State of North Dakota (North Dakota), Bismarck, North Dakota, of a decision of the Telecommunications Access Policy Division (Division) of the Wireline Competition Bureau (Bureau), made on delegated authority.¹ North Dakota seeks review of the Division's decision, denying North Dakota's request for review of a decision of the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator).² For the reasons set forth below, we deny the Application for Review

¹ See Letter from Curtis Wolfe, Information Technology Department, State of North Dakota, filed on behalf of North Dakota School Net, to Michael K. Powell, Chairman, Federal Communications Commission, filed May 3, 2002 (Application for Review)

² Request for Review of a Decision of the Universal Service Administrator by Information Technology Department, State of North Dakota, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., File No. SLD-245592, CC Dockets No. 96-45 and 97-21, Order, DA 02-956 (rel. April 24, 2002) (Division Order), Letter from Curtis Wolfe, Information Technology Department, State of North Dakota, filed on behalf of North Dakota School Net, to Federal Communications Commission, filed October 18, 2001 (Request for Review)

2. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts for eligible telecommunications services, Internet access, and internal connections.³ In order to receive discounts on eligible services, the Commission's rules require that the applicant submit to the Administrator a completed FCC Form 470, in which the applicant sets forth its technological needs and the services for which it seeks discounts.⁴ Once the applicant has complied with the Commission's competitive bidding requirements and entered into agreements for eligible services, the applicant must submit a completed FCC Form 471 application to the Administrator.⁵

3. The Commission's rules direct the Administrator to implement an initial filing period ("filing window") for the FCC Form 471 applications that treats all schools and libraries filing within that period as if their applications were simultaneously received.⁶ Section 54.507(c) of the Commission's rules states that fund discounts will be available on a first-come, first-served basis.⁷ Applications that are filed outside of this window are subject to separate funding priorities under the Commission's rules.⁸ It is to all applicants' advantage, therefore, to ensure that their applications are filed prior to the close of the filing window. In Funding Year 2001, the window closed on January 18, 2001.⁹

4. Applicants may file their FCC Form 471 electronically.¹⁰ In order to have successfully completed the submission of the FCC Form 471 application in Funding Year 2001, applicants who filed electronically also had to complete and mail to SLD the Item 21 description of services, and a paper copy of the Block 6 Certification, the latter of which applicants had to complete and sign.¹¹ A commitment of support is contingent upon the timely filing of the

³ 47 C.F.R. §§ 54.502, 54.503

⁴ 47 C.F.R. § 54.504 (b)(1), (b)(3)

⁵ 47 C.F.R. § 54.504(c)

⁶ 47 C.F.R. § 54.507(c)

⁷ *Id.*

⁸ 47 C.F.R. § 54.507(g)

⁹ In 2001, SLD processed applications as "in window," if they were postmarked by January 18, 2001. See SLD website, Form 471 Minimum Processing Standards and Filing Requirements for Funding Year 4, <<http://www.sluniversalservice.org/reference/471mps.asp>> (Funding Year 4 Minimum Processing Standards). In prior years, this funding period was referred to as Funding Year 4. Funding periods are now described by the year in which the funding period starts. Thus, the funding period which begins on July 1, 2001 and ends on June 30, 2002, previously known as Funding Year 4, is now called Funding Year 2001.

¹⁰ Instructions for Completing the Schools and Libraries Universal Service, Services Ordered and Certification Form (FCC Form 471), OMB 3060-0806 (October 2000) (Form 471 Instructions) at 4-5.

¹¹ Block 6 is the section of the FCC Form 471 where applicants must sign the form and make certifications required under program rules. See Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2000).

applicant's completed FCC Form 471.¹² For Funding Year 2001, all certifications and attachments had to be postmarked by January 18, 2001.¹³

5 On January 18, 2001, North Dakota electronically filed an FCC Form 471 with SLD.¹⁴ North Dakota then mailed the Block 6 certification page and Item 21 attachments, which were postmarked on February 9, 2001.¹⁵ On October 9, 2001, SLD informed North Dakota that the application would be processed as filed outside the filing window because the Block 6 certification page and Item 21 attachments were postmarked after January 18, 2001.¹⁶

6 North Dakota then filed a Request for Review with the Commission.¹⁷ In its Request for Review, North Dakota noted its numerous conversations with USAC about specific filing procedures for Funding Year 2001. North Dakota specifically states that it was "told to keep checking the web site for filing instructions which it did, but failed to note the need to have the paper certification form postmarked by the 18th."¹⁸ North Dakota, however, suggested that its appeal should be granted based upon "confusion resulting from the changes in filing procedures and the complexity of the application documentation required for the Form 471."¹⁹ North Dakota alternatively requested a waiver of the Funding Year 2001 application window.²⁰ North Dakota argued that there was good cause to waive the Commission's rules based on: 1) the first-time nature of its electronic application; 2) the late completion of electronic document submission that would not have allowed sufficient time to travel to the post office; 3) the complex nature of its application; 4) the difficulty in receiving bids from its primary vendor; 5) the allegedly overwhelming nature of the instructions for filing completed applications for Funding Year 2001; and 6) the detrimental impact the denial would have on the public schools and libraries in the

¹² Form 471 Instructions at 3-6

¹³ Because in previous years the delivery of a number of applications was significantly delayed by the postal service, SLD directed that all FCC Forms 471 in Funding Year 2001 would be deemed filed when postmarked, rather than when received by SLD. See SLD website, What's New (November 2, 2000) <<http://www.sl/universalservice.org/whatsnew/110200.asp#110200>> This program change effectively benefited applicants, by relieving them of the risk of unexpected mail delays

¹⁴ FCC Form 471, North Dakota School Net, filed January 18, 2001 (North Dakota Form 471)

¹⁵ *Id*

¹⁶ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Jerry Fossum, North Dakota School Net, dated October 9, 2001

¹⁷ Request for Review

¹⁸ *Id*

¹⁹ *Id*

²⁰ *Id*

state of North Dakota ²¹

7 On April 24, 2002, the Division found that the application was correctly rejected under governing precedent.²² The Division determined that the Block 6 certification page had been filed outside the filing window, and the application was therefore ineligible to be considered within the filing window.²³ The Division also concluded that North Dakota received adequate notice regarding the deadline.²⁴ Further, the Division rejected North Dakota's request for waiver and, applying existing precedent, determined that North Dakota's justifications did not rise to the level of good cause sufficient to waive the Commission's rules.²⁵

8 In this Application for Review, North Dakota argues that the Division's decision was unfair to the State of North Dakota.²⁶ North Dakota incorporates by reference its original Request for Review and requests a waiver of the Commission's rules.²⁷ North Dakota acknowledges that it failed to have its certifications postmarked by the January 18 deadline.²⁸

9. Based on the record before the Commission, we deny North Dakota's Application for Review. Generally, the Commission may grant a waiver for good cause shown.²⁹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.³⁰ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.³¹ Waiver is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.³²

²¹ *Id.*, Letter from Curtis Wolfe, State of North Dakota, Information Technology Department, to Mark Seifert, Federal Communications Commission, dated January 16, 2002.

²² Because the Division found that North Dakota's Block 6 certification page was filed outside the filing window, it determined that it was not necessary to consider whether the Item 21 attachments were timely filed. *See Division Order*.

²³ *Id.* at para. 7.

²⁴ *Id.* at para. 8.

²⁵ *Id.* at paras. 9-13.

²⁶ Application for Review.

²⁷ *Id.*

²⁸ Request for Review at 1.

²⁹ 47 C.F.R. § 1.3.

³⁰ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

³¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972), *Northeast Cellular*, 897 F.2d at 1166.

³² *WAIT Radio*, 418 F.2d at 1159.

10. We conclude that there is not sufficient justification to grant North Dakota a waiver of the filing deadline. North Dakota relies upon the rationale provided in its Request for Review as good cause for the waiver.³³ First, North Dakota appears to argue that it was a novice to the electronic filing process and therefore the mistakes it might have made should be excused.³⁴ We do not agree that the fact that an applicant is new to the electronic application process presents good cause for waiver of the filing deadline. If so, any novice to the schools and libraries mechanism could circumvent program rules by merely alleging that they do not have prior experience with the program. Timely and efficient administration of the program would be impossible under such a scenario. Applicants must comply with program rules, including the application deadline, in order to be eligible for discounts.

11. Second, North Dakota indicates that it completed the electronic submission late on January 18, 2001, the filing deadline, and this would not have given North Dakota sufficient time to travel to the post office to have the certifications properly postmarked.³⁵ We do not believe that this is good cause for waiver of the filing deadline.³⁶ Given the size of North Dakota's application, it was reasonable to expect that it was necessary to plan accordingly and begin the filing process early, in order to assure that the application was filed in a timely manner. Due to the lengthy nature of the application, North Dakota should have reasonably anticipated that it was imperative to begin the application process early, in order to allow adequate time to complete the application process before the deadline.

12. Third, North Dakota indicates that completing the application was a substantial task, and because it was a large and complex application, the filing deadline should be waived.³⁷ We believe, however, that the size and complexity of the application that an applicant chooses to submit to the Administrator does not establish good cause to waive the Commission's rules.³⁸

³³ Application for Review

³⁴ To the extent North Dakota is suggesting that this was the first year FCC Form 471 could be filed electronically, we cannot agree. Applicants have been able to electronically file FCC Form 471 since Funding Year 1999. See Instructions for Completing the Schools and Libraries Universal Service, Services Ordered and Certification Form (FCC Form 471), OMB 3060-0806 (September 1999) (FY 2000 Form 471 Instructions), Instructions for Completing the Schools and Libraries Universal Service, Services Ordered and Certification Form (FCC Form 471), OMB 3060-0806 (December 1998) (FY 1999 Form 471 Instructions)

³⁵ See Request for Review at 1

³⁶ See, e.g., *Pacific Broadcasting Corp.*, Memorandum Opinion and Order, 68 FCC Rcd 845 (1978) ("Parties waiting until the last day to effect delivery of pleadings from out-of-town by common carrier run a considerable risk that unforeseen delay will render their pleadings untimely."), *Upshire County Broadcasting Co.*, 19 RR 21, 24 (1959) ("While an applicant is free to choose when it will file its application, if it withholds the filing of an application until a late date, it must be held to do so at its own peril").

³⁷ See Request for Review at 2

³⁸ Similarly, the Commission has previously held that delay by an entity because of matters within its independent business judgment, and not to unforeseeable circumstances beyond the entity's control, must be considered within the entity's control. See *In Re Revocation of the Licenses of Password, Inc.*, 76 FCC 2d 465 (1980)

The schools and libraries universal service support mechanism was designed so that applicants, ranging in size and needs, could uniquely design applications that suit their community's needs for the technological development of their individual schools and libraries. Applicants in general, and North Dakota in particular, may chose to structure their applications in a manner that request more substantial amounts of support from the program. We understand that larger requests for funding may result in more time consuming and complex applications. It remains the responsibility of the applicant, however, to assess the overall complexity of an application and weigh this approach against the overarching need to file an application that meets the requirements of our rules. We do not believe that it is appropriate to waive the filing deadline on the basis of the size of an application, especially in light of the fact that the funding requests could have been filed in numerous other configurations, depending on the independent judgment of North Dakota.

13 Fourth, North Dakota states that the application process was taxing, because it was difficult to obtain bids from the primary vendor.³⁹ It is incumbent upon applicants to anticipate unexpected, yet reasonably foreseeable circumstances.⁴⁰ To the extent that applicants must rely on information or bids from outside sources, applicants are responsible for planning their application process accordingly, in order to ensure that their application is timely. Further, as noted above, North Dakota could have submitted its application in a different format, so that prepared parts of the application could be submitted early, and thus minimize the portion of the application that was awaiting information from the vendor. We therefore conclude that North Dakota's difficulty obtaining bids from its primary vendor also does not offer sufficient basis for waiver.

14. Fifth, we are not persuaded by North Dakota's argument that a waiver is warranted because the applicable filing procedures were confusing. As the Commission has stated, applying a filing window is necessary to "best serve the needs of applicants" and "assist... in processing these requests in a timely manner."⁴¹ North Dakota has acknowledged that it was told that the relevant information was on the website, but that it failed to "note the need" to meet the postmark filing deadline.⁴²

³⁹ See Request for Review at 2

⁴⁰ See *In re Applications of Mary Ann Salvatoriello*, File No. BPH- 880126OM, Memorandum Opinion and Order, 6 FCC Rcd 4705 (1991), where the Commission stated that it does not usually grant waivers based on inclement weather or failures of third-party couriers because, although these circumstances may be unexpected, they are reasonably foreseeable and therefore applicants should allow enough time to meet cutoff deadlines to account for such unanticipated delays. See also *FCC Overrules Caldwell Television Associates, Ltd.*, Public Notice, 58 RR2d 1706, 1707 (1985)

⁴¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Third Report and Order, 12 FCC Rcd 22485, 22486 (1997) ("We find that the window will reduce pressure on applicants to submit their contract at the earliest possible moment and, thus, will improve accuracy and care with which these contract are negotiated and the accompanying forms are completed.")

⁴² Request for Review

15 Although requiring the certification and related application materials to be filed (i.e. postmarked) by the deadline was a change from prior funding years, SLD's website explicitly informed applicants

Year 4 features NEW and FIRM filing requirements: The January 18 deadline is a POSTMARKING deadline. In order to make sure your application is in the window, all manually submitted materials must be postmarked no later than January 18. Unlike Year 3, all materials associated with the Form 471 have a January 18 deadline: the 471 Form itself (whether electronic or paper); the Block 6 certification for the Form 471 with an original signature by the authorized person, all attachments for Item 21; [and] the Block 5 certification of Form 470 filed for Year 4 (and which is cited in a Year 4 Form 471) with an original signature by the authorized person.⁴³

Thus, we cannot agree that there was such confusion that North Dakota should be granted a waiver. The postmark language was on the website in clear terms and North Dakota acknowledges that it was told that such clear information was on the website, but admits that it failed to 'note' it ⁴⁴

16 In addition, SLD specifically notified North Dakota through its designated contact person about the firm filing deadline through a November 6, 2000 letter.⁴⁵ We therefore find that North Dakota has failed to demonstrate that it should be granted a waiver for this reason.

17. Nor are we persuaded by North Dakota's argument that denial of its application was unfair to the State of North Dakota or that North Dakota has been unfairly prejudged by the change in filing procedures from Funding Year 2000 to Funding Year 2001. All applicants were subject to the same filing window deadline and postmarking rules. In order for the program to be administered in an efficient and equitable basis, applicants must take responsibility for submitting a complete and timely application in accordance with program rules. While we recognize that the application of the filing deadline has a significant impact on North Dakota, we note that many other applicants were able to successfully navigate the application process. In Funding Year 2001, 34,271 applications were successfully filed within the filing deadline ⁴⁶ In

⁴³ See SLD website, What's New (November 2, 2000)
<<http://www.sl.universalservice.org/whatsnew/112000.asp#110200>>

⁴⁴ Request for Review

⁴⁵ Letter from Schools and Libraries Division, Universal Service Administrative Company, to applicants, dated November 6, 2000. SLD records indicate that a copy of the letter was mailed to Wayne Wermager at North Dakota School Net. North Dakota identified Wayne Wermager as its authorized person in its FCC Form 471 application and Wayne Wermager signed the Block 6 certification page from North Dakota's FCC Form 471. See North Dakota Form 471. This letter was mailed to 61,000 applicants or potential applicants.

⁴⁶ See Letter from Kate L. Moore, President, Schools and Libraries Division, Universal Service Administrative Company, to Dorothy Attwood, Chief, Common Carrier Bureau, dated February 28, 2001. 28,954 of the 34,271 applications were filed electronically.

sum, we therefore decline to waive the Commission's rules based on allegations that its rules and USAC procedures were confusing.

18. Finally, North Dakota asserts that denial of its application may have a detrimental impact on schools and libraries.⁴⁷ We recognize that this application is important to the schools and libraries of North Dakota. It is incumbent upon us, however, to take into consideration the impact that waiver of the filing deadline would have on the overall operation of the schools and libraries program, and other applicants to the program. Most, if not all, applicants to the schools and libraries program, with both large and small applications, frequently depend heavily on discounts from the schools and libraries mechanism. If that alone were grounds for granting a waiver, it is hard to imagine a circumstance where waiver would not be warranted, which would eviscerate the benefits of having a filing window at all. Therefore, we do not believe that the denial of North Dakota's application creates the special circumstances or particular facts that warrant a waiver of the Commission's rules.⁴⁸ In addition, we note that North Dakota, like many other schools and libraries that fail to comply with the filing deadline, will be able to reapply for funding in future years of the schools and libraries mechanism.⁴⁹

19. Accordingly, we do not believe that the facts described by North Dakota in its Request for Review rise to the level of special circumstances required for a deviation from the general rule. Indeed, we find the circumstances described by North Dakota -- such as difficulty filing electronically, the necessity of beginning the application process early for complex applications, difficulty obtaining bids, and alleged confusion over the program's procedures -- are all reasonably foreseeable events that are generally overcome by adequate planning. In addition, the fact that the enforcement of the filing deadline has caused North Dakota to lose valuable assistance for schools and libraries for Funding Year 2001 does not distinguish it from other applications. Thus, North Dakota has failed to demonstrate why it should not be held to the same standard as all other applicants.

20. Further, we conclude that granting North Dakota's waiver would not serve the public interest. As explained above, in considering North Dakota's waiver request, it is appropriate to take into account the impact the waiver may have on the schools and libraries support mechanism. It is essential to the program's operation that SLD be able to reasonably estimate demand for discounts after the close of the filing window in order to begin funding applications. If we were to waive the filing deadline based on the facts asserted by North Dakota, it would be necessary for the Commission to grant waivers of the filing deadline based on similar justifications for other applicants as well. Due to the nature of North Dakota's arguments -- and

⁴⁷ See Request for Review at 2-3

⁴⁸ See *Request for Review of the Decision of the Universal Service Administrator by Mastermind Internet Services, Inc., Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028, 4035 ("While enforcement of these requirements has a harsh consequence for these particular applicants, the underlying policy is critical to the integrity of the program.")

⁴⁹ In Funding Year 2002, North Dakota School Net received funding commitments of \$4,016,962 for telecommunications services and \$333,600 for Internet access.

the fact that most applicants face comparable challenges – we believe that granting a waiver of the filing deadline here would effectively thwart enforcement of the filing deadline in the future. Simply put, we do not see any limiting principle that would allow the Commission to deny similar waiver requests in the future. Because this program is subject to a \$2.25 billion funding cap, waiving rules to provide funding to certain applicants will have the effect of denying funding to other applicants that successfully complied with all filing requirements. Thus, we conclude that granting North Dakota's waiver would seriously undermine the administration of the schools and libraries mechanism. As a result, we conclude that it would not be in the public interest to grant the waiver, and therefore find that North Dakota has not set forth good cause to waive the Commission's rules

21. ACCORDINGLY, IT IS HERBY ORDERED, pursuant to section 1.115 of the Commission's rules, 47 C F R. § 1.115, that the Application for Review filed by Information Technology Department, State of North Dakota, Bismarck, North Dakota, on May 3, 2002 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

**JOINT STATEMENT OF COMMISSIONERS
MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN,
DISSENTING**

Re: *Application for Review of a Decision by the Wireline Competition Bureau,,
Information Technology Department, State of North Dakota, Bismark, North
Dakota, Federal-State Joint Board on Universal Service; Changes to the Board
of Directors of the National Exchange Carrier Association, Inc,*

Since the inception of the Schools and Libraries Program in 1997, a whole new world of opportunities has been opened to students who might not have access to advanced capabilities without the program. Last year, nearly \$1.7 billion was disbursed to schools and libraries across the United States. We are ardent supporters of this program, in addition to the other universal service programs.

We are troubled that the complexity and rigidity of our application process sometimes prevents eligible and deserving children from experiencing the manifold opportunities that this program allows. This is surely the case with this application filed on behalf of the students of North Dakota. The State of North Dakota filed an electronic application for E-Rate discounts within the filing window, but failed to mail a signed certification until after the window closed. This oversight should not be allowed to exclude the children of North Dakota from access to the necessary tools of the Information Age.

In April of this year, we began taking steps toward improving this already excellent program by initiating a rulemaking that seeks to simplify and streamline the operation of the schools and libraries program. In response to our call for input, many have said that the process is just too complicated and we should work to streamline it and make it more user -friendly. We must balance our need to maintain our keen oversight over this program with efforts to improve access to this program for eligible participants. As members of this Commission, we will work toward that admirable goal.